# IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	CRIMINAL NO. 00-212
vs.	)	
	)	
RICHARD McATEE	)	
	)	ORDER
Defendants.	)	

THE COURT HAS BEFORE IT defendant Richard McAtee's motion to suppress, filed November 14, 2000. The United States resisted the motion November 17, 2000, and an evidentiary hearing was held by the Court on November 21, 2000. The matter is now considered fully submitted.

# I. BACKGROUND

Based on the testimony and evidence presented during the hearing, the Court makes the following findings of fact. On July 13, 2000, at approximately 4:07 p.m., Iowa State Patrol ("ISP")

Officer Randy Wacha was on routine patrol duty on Interstate 80 near Waukee, Iowa when the dispatch center broadcast an attempt to locate a black BMW with Iowa license plate 973FGP, heading westbound on I-80 near mile marker 122. The dispatch center had received an anonymous tip via cellular telephone from a concerned citizen who allegedly had witnessed the driver drinking an alcoholic

beverage. The dispatcher further advised that the registered owner of the BMW had an Earlham, Iowa address.

At the time of the dispatch, Officer Wacha was observing traffic from the median at mile marker 112. A few minutes thereafter, he observed a black BMW with the same license plate number drive westbound past the patrol vehicle. Officer Wacha pulled out from the median and followed the BMW for approximately one-half mile before catching up to it. Although Officer Wacha did not observe the driver commit any traffic offenses during this brief period, he nevertheless made the decision to stop the BMW based on the information given in the radio dispatch.

Officer Wacha activated his red lights and his wigwag headlights. The driver of the vehicle did not stop immediately, but motioned with his right arm that he would stop on the westbound exit ramp at the 106 interchange, which the vehicles were rapidly approaching.

Officer Wacha believed this to be a reasonable course of action, and did not perceive the driver's conduct as an attempt to avoid the stop. The driver of the BMW did not stop immediately upon entering the ramp, however. Rather, he slowed down his vehicle and traveled for approximately 200 feet. During this period, Officer Wacha observed the driver making "furtive" movements with his right arm in an apparent attempt to hide something in the center seat area, and behind the driver's seat.

Once the BMW came to a complete stop, Officer Wacha also stopped his vehicle immediately behind the BMW. Officer Wacha approached the BMW and asked the driver, Mr. McAtee, to exit the vehicle. He then asked Mr. McAtee what he was trying to hide, to which Mr. McAtee responded, "nothing." The two men went to the rear of the BMW. Mr. McAtee laid out his billfold on the lid of the trunk with an Iowa I.D. showing, but not a driver's license.

The two men "had a conversation" about the fact Mr. McAtee had no driver's license, and Mr. McAtee admitted it had been revoked for operating a motor vehicle while under the influence.

Based on the fact Mr. McAtee was driving without a valid driver's license, Officer Wacha made the decision to arrest the defendant and impound the BMW. Shortly thereafter, Mr. McAtee admitted to the officer he had been trying to hide an open bottle of beer under the seat.

Officer Wacha recovered an open, 22 ounce bottle of beer under the driver's seat of the BMW, as well as a second bottle of liquor in a sack behind the same seat. Officer Wacha asked Mr. McAtee to wait in the patrol car while Officer Wacha requested tow service and conducted a routine inventory check. During the inventory check, Officer Wacha found a registration confirming that the vehicle was registered to Mr. McAtee's wife. He also uncovered a soft leather bag containing one large and three small plastic bags of marijuana.

At this point, it appears Mr. McAtee was placed under arrest for intent to deliver marijuana. A further search of his vehicle uncovered contents of a marijuana pipe, burnt marijuana cigarettes, zig zag, cigarette rolling papers, and a small electric scale with an empty cool whip container used for holding items as they are being weighed.

Based solely upon the traffic stop and items seized during the search of the BMW, a search warrant was obtained for Mr. McAtee's residence at 2168 360<sup>th</sup> Street in Earlham, Iowa. During the residence search, authorities found marijuana plants growing on the south side of the garage. A canine was later brought in and led to the discovery of a large plastic bag containing approximately two pounds of marijuana, assorted marijuana paraphernalia, a small tin with cocaine residue, \$1,500.00 in cash, and several firearms and ammunition. A seven count indictment was filed September 27, 2000,

charging him with four counts of possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(D); two counts of possessing of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1); and one count of being a felon in possession of a firearm, in violation of 922(g)(1).

In his present motion to suppress, Mr. McAtee claims the initial stop of his vehicle was unconstitutional, and that the evidence seized as a result of the search must be suppressed. He further contends that the subsequent search of his residence, supported solely by evidence obtained as a result of the initial traffic stop, was also unconstitutional.

### II. APPLICABLE LAW & DISCUSSION

As reaffirmed yesterday by the United States Supreme Court: "The Fourth Amendment requires that searches and seizures be reasonable." *City of Indianapolis v. Edmond*, No. 99-1030, 2000 WL 1740936 at \*3 (U.S. Nov. 28, 2000). Authorities may stop, or "seize" an automobile if they have "reasonable suspicion" that the occupant or occupants have violated the law. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). "An officer has reasonable suspicion sufficient to make a stop without a warrant if the police officer can point to 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *United States v. Owens*, 101 F.3d 559, 561 (8<sup>th</sup> Cir. 1996) (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). A reviewing court must consider the totality of the circumstances surrounding the stop, mindful of the significance that an experienced law enforcement officer would place on particular facts involved. *United States v. Turpin*, 920 F.2d 1377, 1385 (8th Cir. 1990). With these parameters in mind, this Court must

determine first, when Mr. McAtee was "seized" under the meaning of the Fourth Amendment, and second, whether that seizure was supported by reasonable suspicion.

#### A. When Seizure Occurred

Mr. McAtee contends he was "seized" the moment at which he pulled off onto the exit ramp, thereby "submitting" to Officer Wacha's show of authority. The United States argues, however, that the "seizure" did not occur until Mr. McAtee actually stopped his vehicle, enabling Officer Wacha to use any information up to that point to support reasonable suspicion.

The United States Supreme Court has held that a seizure occurs if "there is a governmental termination of freedom of movement *through means intentionally applied.*" *Brower v. Inyo*County, 489 U.S. 593, 597 (1989) (emphasis in original). In *Brower*, police officers activated their flashing lights in an attempt to stop the decedent, who was driving a stolen vehicle. *Id.* at 594-597.

Rather than stopping, however, the decedent chose to lead the officers on a 20 mile chase, eventually losing control of his vehicle and crashing into a police roadblock. *Id.* at 594. Writing for the majority, Justice Scalia found that no "seizure" had occurred based on the fact the decedent was stopped *not* by the police officers' "show of authority," but by his own "loss of control of his vehicle and the subsequent crash." *Id.* at 597. Justice Scalia noted that: "If, instead of that, the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure." *Id.* 

Two years later, in *California v. Hodari D.*, 499 U.S. 621, 629 (1991), Justice Scalia again wrote for the majority that "[a]n arrest requires either physical force . . . or, where that is absent, *submission to the assertion of authority*." (emphasis added). Because the suspect in *Hodari D*. did

not comply with the officer's initial show of authority, the majority found he was not "seized" for constitutional purposes until he was physically tackled to the ground. *Id*; *see also United States v*. *Segars*, 31 F.3d 655, 658 (8<sup>th</sup> Cir. 1994) (citing *Hodari D*. for premise that seizure occurs upon "submission to the assertion of authority").

In the present case, however, both sides agree Mr. McAtee reacted immediately to Officer Wacha's emergency lights, or "show of authority," by signaling to the officer that he would pull off onto the approaching exit ramp. Officer Wacha testified during the hearing he "had no other indication" that Mr. McAtee did not intend to stop. In fact, because of the vehicles' proximity to the ramp, the officer "didn't give [Mr. McAtee's decision to pull off onto the ramp] a second thought." From these facts, the Court finds Mr. McAtee "submitted" to Officer Wacha's authority, and was thereby seized, immediately after Officer Wacha activated his emergency lights.

The fact Mr. McAtee may have proceeded down the ramp for approximately 200 yards prior to coming to a complete stop does not alter this finding. This appears to be a fairly minimal distance in which to come to a complete stop off of an interstate highway, and would allow traffic exiting the same ramp ample time to react to the stopped vehicles. Likewise, the Court also does not believe Mr. McAtee's "furtive" movements while attempting to hide his liquor bottles affect the time of seizure. That Mr. McAtee may have tried to "minimize his damages" in no way suggests he was no longer subject to the officer's authority. *See also Terry*, 392 at 19 n.16 (a seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen"). This is *not* a situation in which Mr. McAtee initially *appeared* to submit to authority, yet then chose to flee. *Cf. United States v. Hernandez*, 27 F.3d 1403, 1406 (9th Cir. 1994) (no seizure

found when defendant hesitated and made eye contact with officer before chosing to flee). Rather, Mr. McAtee's conduct from the moment Officer Wacha activated his lights is entirely consistent with an individual who had surrendered to authority.

B. Whether Officer Wacha had "Reasonable Suspicion" to Effecutate Seizure

The Court must now determine whether, at the time of seizure, Officer Wacha had

reasonable suspicion to make the stop. The Court holds that he did not. In *Florida v. J.L.*, 529 U.S.

266, \_\_\_\_, 120 S.Ct. 1375, 1379 (2000), the United States Supreme Court recently found that an
anonymous tip, without more, does not provide "sufficient indicia of reliability to provide reasonable
suspicion to make the investigatory stop." (quoting *Alabama v. White*, 496 U.S. 325, 327 (1990)).

Furthermore, the fact an anonymous tipster may have provided an accurate description of the suspect's
appearance and whereabouts does not provide the necessary reliability. As explained by the Court:

"An accurate description of a subject's readily observable location and appearance is of course reliable
in this limited sense: It will help the police correctly identify the person whom the tipster means to
accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal
activity." *Id.*, at \_\_\_, 120 S. Ct. at 1379.

As in *J.L.*, Officer Wacha knew nothing about the informant, and had no other reason to suspect the individual was engaged in criminal behavior. *Id.*, at \_\_\_\_, 120 S. Ct. at 1379. Although it would have been within his authority to follow Mr. McAtee's vehicle for a short distance to observe his vehicle and movements, and perhaps corroborate the tipster's information, Officer Wacha did not pursue this course of action. Rather, he made the decision to stop Mr. McAtee's vehicle the moment

the BMW passed by. The Court finds Officer Wacha lacked a "reasonable suspicion" to seize Mr. McAtee.

# C. Whether the Evidence Must be Suppressed

Direct evidence obtained during an illegal search "is subject to the exclusionary rule first recognized in *Weeks v. United States*, 232 U.S. 383 (1914))." *United States v. Kelly*, 547 F.2d 82, 85 (8<sup>th</sup> Cir. 1977). Accordingly, all evidence seized from the McAtees' black BMW on July 13, 2000 must be excluded. Derivative evidence, such as that obtained from the search of Mr. McAtee's residence, "is admissible (1) where the government learns of it from a source independent of and distinct from the illegal activity . . . or (2) where its connection to the illegality has 'become so attenuated as to dissipate the taint." *Id.* (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939) (other internal citations omitted).

In the present case, the information used to obtain the search warrant for Mr. McAtee's residence was derived exclusively from the July 13, 2000 traffic stop, and items seized from Mr. McAtee's vehicle at that time. *See* Attachment A to Application for Search Warrant, Attached to Defendant's Brief in Support of Motion to Suppress. The United States has not attempted to prove that it learned of the information from an independent source. *Kelly*, 547 F. 2d at 85. Nor is there evidence the items seized from the residence "would have been inevitably discovered absent the illegal conduct." *United States v. Durant*, 730 F.2d 1180, 1185 (8th Cir. 1984). Accordingly, all items obtained during the July 13, 2000 search of Mr. McAtee's vehicle and subsequent search of his residence must be suppressed.

## III. CONCLUSION

For the foregoing reasons, defendant's motion to suppress is GRANTED. During the hearing, counsel for the United States indicated it would not pursue prosecution if the Court granted the motion to suppress. If this is not the case, however, counsel should contact the Court as soon as possible, to enable the Court ample time to address the pending motion to dismiss.

IT IS SO ORDERED.

Dated this \_\_\_\_ day of November, 2000.

RONALD E. LONGSTAFF, JUDGE UNITED STATES DISTRICT COURT

-9-